Trade Practices Act Review

The submission focusses on submissions to the Trade Practices Review Committee by the ACCC - criticising their assumptions, logic and substance. A second submission to the Commonwealth Government's Trade Practices Review Committee, 12 July 2002
The submission was prepared by David Griffiths, Secretary, Co-operative Federation of Victoria Ltd.

Trade Practices Act Review and the ACCC

The purpose of this supplementary submission is to comment on the ACCC's analysis and proposals in its submission to the Trade Practices Act Review.

This submission supplements our primary submission that argued that competition law in Australia ignored the co-operative difference and that public policy should accommodate this difference.

The impetus for this supplementary submission is disappointment with the submission by the ACCC – a submission that has relied on assertions for its case for a modified status quo.

The premise of the ACCC's submission and proposal is complacency with the status quo. The ACCC does not appear to understand that there is a continuing need to review competition law in the context of ongoing globalization, concentration and consolidation, developments and practices in other countries and that an argument for a modified status quo requires substantiation – not assertions.

The ACCC notes that its submission focuses on:

> How collective bargaining is dealt with in Australia through the authorisation process
>
> How small business collective bargaining issues are dealt with in some key overseas jurisdictions
>
> The Commission's assessment of the main policy options for improving the Trade Practices Act (the Act) and its administration to achieve a more efficient, fair, timely and accessible competition law framework, in light of concerns raised by small businesses regarding collective bargaining. (p 106)

It is not surprisingly that the ACCC's submission is self-serving in arguing for a modified status quo. The ACCC notes that its "preferred option is a notification

process for collective bargaining modeled on the existing notification process for exclusive dealing. Access to this process should be restricted to small businesses dealing with large businesses with a substantial degree of market power." (p 106)

This proposed modification will further limit the possibility of individuals, small businesses and local communities working together in co-operatives for mutual and community benefit.

The claim by the ACCC that it aims to achieve more efficient, fair, timely and accessible competition law framework is seductive for it is hard to disagree with efficiency for these words evoke a self-evident and self-justifying quality.

The words are not self-evident and their definition and application is culturally and ideologically determined.

The ACCC adopts a definition of what is efficient, fair, timely and accessible as being the competition law status quo in Australia. It's modest modification proposals reinforce the status quo.

The essence of the ACCC's position is revealed in its argument that the issue is communication rather than structural in arguing that: "the Commission recognizes that it could better use its small business and rural outreach networks to help small businesses through the authorization process." (p 118)

Co-operative Difference

The ACCC's analysis simply confirms the argument of our primary submission that competition legislation in Australia does not recognize the essential difference between small players co-operating together for mutual and community benefit and the anti-competitive practices of large investor-owned companies. Instead, competition legislation creates an environment in which the Trade Practices Commission does not adequately differentiate between co-operatives, and small businesses, and cartels.

The ACCC's comments on collective bargaining and small business confirms its continuing failure to recognize and make this distinction.

The ACCC has implicitly rejected the argument that co-operatives are different. It has avoided, however, an explicit rejection for this would necessitate coming to terms with the ILO and UN acknowledgement of the co-operative difference and the consequences this has for public policy.

Co-operative Development

A focus of our concern is how competition policy and practice in Australia ignores and inhibits co-operative development – and social benefit.

An example of this is the claim that individual doctors and practices in a rural town that co-operate to provide an after-hours service by rotating the service between the doctors and practices are creating an anti-competitive cartel.

To argue that this is anti-competitive defies the reality of social benefit achieved through accessible and affordable medical services.

In the UK doctors have combined to provide an after-hours medical service that the ACCC would regard as anti-competitive. In the UK GP co-operatives have been formed by groups of GP's to provide an out-of-hours service. The co-operatives are managed by GP's and the service is provided by member GPs.

The first GP co-operative was formed in 1977. There are currently 300 GP co-operatives in the UK formed by 25,000 GP's – about two thirds of all GP's in the UK.

According to the logic of the ACCC a medical corporation could purchase GP practices, provide an after-hours service and not be deemed anti-competitive.

Neither Robust nor Thorough

While it is not surprising that the ACCC prefers a modified status quo, it is disappointing that the ACCC's arguments for a modified status quo and its rejection of alternatives are not robust or thorough.

Having determined for a modified status quo, the ACCC's analysis of the options is designed to disprove alternatives to a modified status quo through assertion rather than analysis.

The ACCC's assessment of the main policy options should have attempted to adequately explore the dynamics and rationale of the options instead of creating straw explanations of alternatives for dismissal by assertion.

Assertions Not Evidence

Throughout its analysis the ACCC relies on a series of assertions to validate its argument for a modified status quo. By implication, then, the ACCC's assertions are self-evident – defying the need for definition and explanation.

Some of the ACCC's arguments for a modified status quo are briefly examined to demonstrate the assertion-based nature of the ACCC's submission:

Public Interest Assertion

The ACCC argues that policy options should “provide a mechanism to ensure that immunity is only granted where conduct is likely to operate in the public interest.” (p 117)

The ACCC, however, does not bother to examine how the alternatives would impact on even its own definition of the public interest.

Consumer Welfare Assertion

The ACCC argues that an exemption for small business would “reduce consumer welfare.” (p 108)

This could be a valid objection but the assertion needs to be based on definitions and evidence – what consumer welfare is being specifically reduced in what way and how. The ACCC subsequently argues that increases in inefficiency across all sectors of the economy would reduce consumer welfare.

The assumption, therefore, is that consumer welfare is measured by increases and decreases in efficiency – depending, of course, on the definition of efficiency. Consumer welfare, therefore, is narrowly defined.

Block Exemption Assertion

The ACCC argues: “While a block exemption power could mean benefits for both business and the Commission, adopting a block exemption power would be a significant departure from Australia’s current competition law framework.” (p 128)

A block exemption may or may not be a significant departure from Australia’s current competition law framework.

There are implications, not necessarily consistent with each other, within this assertion (a) that a block exemption is a significant departure and that (b) a significant departure is not desirable because it is a significant departure.

A significant departure, or however it may be characterized, from the existing framework of competition law in Australia may be necessary. The departure needs to be considered on its merits and not implied as undesirable because it may or may not be a significant departure.

The explicit and implicit arguments of the ACCC may have merit but assertions do not create evidence.

Legislation Exemption Assertion

The ACCC argues that a legislation exemption “would undermine the fairness, legitimacy and effectiveness of the Act’s competition provisions.” (p 129) But, the, this asserts and assumes that the Act is fair, legitimate and effective.

The Act may or may not be fair, legitimate and effective. The assertion needs to be supported by evidence of fairness, legitimacy and effectiveness. The ACCC does not, however, provide any evidence.

What is fair, legitimate and effective depends on definition and analysis of what has happened and influencing variables – not on assertions about what has happened.

The ACCC quotes the 1976 Swanson Committee “that the Trade Practices Act should start from a position of universal application to all business activity … only in this way will the law be fair, and be seen to be fair, and avoid giving a privileged position to those not bound to adhere to its standards.” (p 129)

Here the ACCC’s own assertions are based on the Swanson Committee’s assertions.

Swanson Committee Assertions

It is asserted by the Swanson Committee that there should be universal application of competition law. The ACCC endorses this assertion without analysis.

Critical to this assertion is what is meant by universal application.

Universal application could mean the general application of competition policy and law. It does not necessarily equate sameness in the specific application of competition law. Competition law could be universal but its specific application dependent on specific circumstances.

The recognition of the co-operative difference by the Government and through the Trades Practices Act and the ACCC is basic to the principle of equal treatment and non-discrimination of co-operatives. The principle of equal treatment and non-discrimination of co-operatives is fundamental for the co-operative movement and co-operative development.

The ACCC's own submission acknowledges, albeit reluctantly, that the specific application of competition law differs in Europe and the USA from its application in Australia – proving that there is not a universal definition and application of fair, legitimate and effective competition law.

There is a critical failure by the ACCC to recognize that equal treatment and non-discrimination requires different treatment and that the failure to treat co-operatives differently is unfair and discriminatory.

USA Assertions

The ACCC does admit: "Agriculture is one of the few US industries that are to various degrees exempted from general anti-trust laws. These exemptions are in a number of US statutes, including the Capper-Volstead Agricultural Producers' Association Act, which allows persons engaged in the production of agricultural products to act together for the purpose of 'collectively processing, preparing for market, handling and marketing' products. However, this exemption is not absolute and the Secretary for Agriculture is authorized to act against cooperatives that monopolise or restrain trade to such an extent that the price of the agricultural product is 'unduly enhanced'." (p 116)

The ACCC does not continue to examine the USA rationale for exemption. What underpins USA competition policy towards co-operatives is the recognition that co-operatives are different – that co-operative businesses are different because they are member-owned, democratically controlled and driven by the needs of their members and their community and that this difference is critical for consumers. Unlike Australia, co-operatives in the USA are full partners in the democratic process.

Co-operatives by their very structure and nature involve the collaboration of individuals who act in unison – to achieve bargaining power in a market otherwise dominated by investor-owned enterprises. Farmers and fishermen co-operate to get a fairer deal from large-scale buyers of their products and small businesses co-operate to get a better deal from manufacturers and suppliers.

Conclusion

The ACCC submission should be seen for what it is – a defence for a modified status quo and does not provide the Trade Practices Act Review with a rigorous analysis of the alternatives.

The ACCC's observations on alternatives are conditioned by this defence. The analysis of alternatives has the consequence, if not the intention, of supporting the ACCC case for a modified status quo.

The ACCC submission is also strong in assertions and weak in evidence. The ACCC fails to substantiate its case for a modified status quo.

The challenge for the Trade Practices Act Review, therefore, is to develop a substantive analysis that is not dependant on the ACCC submission. In particular, the Trades Practices Review needs to examine the work of the ILO in understanding and articulating the co-operative difference and the obligation this imposes on public policy debate and decisions.

The Trade Practices Act Review should at a minimum consider the relevance of the ILO recommendation to its deliberations and in its report comment on its assessment of this relevance.

David Griffiths
Co-operative Federation of Victoria Ltd
71 Franciscan Avenue
Frankston VIC 3199
Telephone: 9785 6704 Facsimile: 9785 6542

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